BRIEF IN SUPPORT OF PETITION

I

The Court of Appeals erred in upholding the notice as adequate.

1. The petitioner was a known resident-owner in possession of the property at the time that the action was started.

There was no seizure of the property. Under such circumstances, the notice published and posted should have identified the property subject to the action at least by the block and lot number, and might well have included the name against which it was assessed as the owner thereof, in order to render it reasonably probable that the parties interested in the property would get notice in time to redeem.

The only possible objection to this suggestion is the cost of printing such notice. This would have been trifling with several million dollars worth of property involved and would have cost but a few hundred dollars more to print such identification of the property, which would mean but a few cents as to each parcel.

Indeed, while this is claimed to be an action In Rem, there can be no lawsuit without parties. (See: *Elmendorf* v. *DeLancey*, I Hopkins Ch. (N.Y.) 555; *MacAffer* v. *Boston & Maine R. R. Co.* 242 App. Div. 140, 144, 1 C. J. 982, and cases cited.)

In actions In Rem the property is named as the defendant (see: *Freeman* v. *Alderson* 119 U. S. 185). In New York State, an action is commenced by the service of a summons (*C. P. A.* Section 218). The summons must name the parties (*C. P.* Rule 50). (See: *Leonard* v. *Price*, 182 N. Y. 431, 433.) Here no property is named in the notice (tak-

ing the place of a summons) as defendant. Yet the judgment is entered against specified property. It would seem clear that such notice was inadequate to afford due process of law. (See: *Wuchter* v. *Pizzuti*, 276 U. S. 13; *Central of Georgia* v. *Wright*, 207 U. S. 127; *Davidson* v. *New Orleans*, 96 U. S. 97; *Stuart* v. *Palmer*, 74 N. Y. 183.)

This scant notice is sought to be justified on the ground that this is an administrative and not a judicial proceeding, because it is for the collection of tax liens; yet the City sought and got a final judgment directing the transfer of petitioner's property to it. This creates a conclusive presumption and not merely a PRIMA FACIE one. It may be followed by writ of assistance ousting petitioner from possession. A judgment creating a conclusive presumption and writ of assistance to enforce the same can only be granted in judicial proceedings. It is plain that this is a judicial and not an administrative proceeding.

See:

Milwaukee County v. *White & Co.*, 296 U. S. 268;
Marx v. *Hanthorne*, 148 U. S. 72;
Londoner v. *Denver*, 210 U. S. 373, 376;
King v. *Mullins*, 171 U. S. 404;
Thompson v. *Auditor General*, 261 Mich. 424;
Auditor General v. *Dutcher*, 275 Mich. 462.

Administrative proceedings contemplate that judicial proceedings may follow before the presumption becomes final.

See:

Marx v. *Hanthorne*, 148 U. S. 172;
Anderson National Bank v. *Luckett*, 321 U. S. 233, 88 Law Ed. 499, 507;
People v. *Ladew*, 237 N. Y. 413, 422, 423.

This is a drastic statute. It provides only for one week's time to redeem after service of the summons is complete.

Before the notice came to petitioner's attention, the time to redeem had passed and its property was lost. This is an important factor to be taken into account in considering the sufficiency of the notice.

2. The notice does not warn those interested that the property would be forfeited to the City as was done by the judgment. The notice says that there will be a foreclosure of the property. Foreclosure in New York means a sale of property to satisfy the liens upon it, with the surplus being paid to those entitled thereto (*C. P. A. Section 1082; Moulton* v. *Cornish*, 138 N. Y. 133, 143, and *Thomas* v. *Harmon*, 122 N. Y. 84, 89). As the property here is worth many times the amounts of the liens against it, a considerable surplus could be expected in case of sale.

See:

United States v. *Lawton*, 110 U. S. 146;
Southerland v. *City of Brooklyn*, 156 N. Y. 605;
People ex rel. McColgan v. *Palmer*, 10 App. Div. 395.

The notice not having apprised the parties interested that this surplus would be confiscated it did not meet the requirements of due notice. (See: *Hassall* v. *Wilcox*, 130 U. S. 493, 504; *Windsor* v. *McVeigh*, 93 U. S. 74.)

II

The Court Erred in Upholding the Judgment of Forfeiture

1. Prior to the passage of this act in 1938, the City had no right to confiscate the property for failure to pay taxes or assessments or to have it declared forfeited for such reason. Other methods, however, were provided for the collection of revenue. (See: *County Securities, Inc.* v. *Seacord*, 278 N. Y. 34).

This act, however, gives the City the right to enter judgment of forfeiture for the default in payment of tax liens

(Section 165-h, Subdivision 6). As construed and applied, the act covers defaults occurring several years before its passage, and thus it is retroactive.

2. The property was worth many times the amount of the tax liens upon it. It could be sold at auction in the proceeding as well as being taken by the City, and afterwards sold at auction. It had to be sold in order to raise revenue. Thus by the judgment the surplus value of the property was confiscated.

Thus by retroactive regulation which is arbitrary and unreasonable, the petitioner is deprived of its property in which it had a vested right, without due process of law. This right of confiscation or forfeiture is a new right, not a new remedy. (See: *Truax* v. *Corrigan*, 257 U. S. 312; *Jacobus* v. *Colgate*, 217 N. Y. 235; *Germania Bank* v. *The Suspension Bridge*, 159 N. Y. 62.) That it deprives the petitioner of its vested rights.

See:

United States v. *Lawton*, 110 U. S. 146;
Welsh v. *Henry*, 305 U. S. 134, 147;
People v. *O'Brien*, 111 N. Y. 1;
Ostrander v. *Reiss*, 206 N. Y. 448, 453;
Matter of Lacidem Realty Corp. v. *Graves*, 288 N. Y. 354;
Spitcausky v. *Hatton*, 182 S. W. 2nd (Mo.) 86, 106;;
Ettor v. *Tacoma*, 228 U. S. 148.

III

The prayer of the petitioner that a writ of certiorari issue should be granted.

Respectfully submitted,

SEACORD, RITCHIE & YOUNG,
Attorneys for Petitioner.
542-544 Main Street,
New Rochelle, New York.

ALBERT RITCHIE,
Of Counsel.

(8634)